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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS,

V.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE STUDENT PRESS LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES

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STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case that has been litigated in the United States since 1970.

The Student Press Law Center is a national, not-for-profit, incorporated, legal research, information and advocacy organization formed for the purpose of educating high school and college journalists about the importance of the First Amendment and defending their free speech rights. The Center has submitted numerous *amicus curiae* briefs, including a brief before this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995).

This brief is submitted on written consent of the parties.

STATEMENT OF THE CASE

Amici adopt the Appellee's Statement of the Case.

SUMMARY OF THE ARGUMENT

Open and informed debate is critical to maintaining a sound democracy, and the press plays a significant role in facilitating social discourse. Mindful of the press' function in furthering the free flow of ideas, courts have granted the broadest First Amendment protections to the gathering and dissemination of news. In light of this long tradition of protecting the editorial integrity of the press, *amici* respectfully request that the Court take into consideration the detrimental

impact that the Communications Decency Act ("CDA") would have on every news organization in this country and the public that relies on those organizations.

News organizations of all types maintain Internet sites where online versions of their news stories are posted. Because the Internet most closely resembles the print medium, it too should receive the most exacting First Amendment protection. The *Pacifica* broadcast model of content regulation does not fit the unique technical characteristics of the Internet.

The Internet has revolutionized the investigating and reporting of news. Journalists utilize the Internet to gain access to information, to post stories and to communicate with readers. There are endless examples of newsworthy topics that arguably fall within the purview of the statute and that could subject journalists to criminal sanction for doing their jobs. As this Court has noted in other contexts, editors faced with such penalties will seek to avoid liability by excluding potentially controversial material from their websites. The inevitable result of the statute, even if it is never enforced against a news organization, will be to chill free speech on important public issues.

ARGUMENT

I. This Court should consider the adverse impact that the CDA would have on the gathering and dissemination of news.

Journalists have a particularly strong interest in the instant case that should inform this Court's analysis of the CDA. The CDA would have a detrimental impact on the processes of newsgathering, news dissemination and the exercise of editorial judgment, all of which are entitled to the most exacting First Amendment protection. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated"); *New York Times v. United States*, 403 U.S. 713 (1971) (the Government is proscribed from enjoining publication of current news, except in the most extreme circumstances); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (right of reply statute violates a newspaper's First Amendment right to editorial freedom). Information is the stock in trade of journalists, and the CDA makes them vulnerable to criminal prosecution simply for doing their jobs.

A. The Internet has become an invaluable and irreplaceable resource to journalists.

No other field has been altered more drastically by the proliferation of computer assisted research tools, including the Internet, than journalism. David Noach, *Setting Parameters*, *Editor & Publisher*, February 8, 1997 (citing a 1995 study in which 68% of the journalists polled said they use the Internet for research). The Internet provides journalists with instantaneous access to vast quantities of information, and has enlarged

investigative and data-gathering possibilities.[1]

The Internet has also transformed the way news is disseminated. According to the *American Journalism Review*, as of February 11, 1997, 768 commercial newspapers publish online editions, and 50 newspapers start publishing online each week. AJR News Link, http://www.newslink.org/emcol.html. The College Press Network reported on February 12, 1997, that 171 college newspapers maintain websites. *See* http://www.cpnet.com/news/state.html.

News posted on the Internet can be updated hourly, and can reach a global audience numbering in the millions. In addition, editorial staff can communicate regularly and immediately with readers. Journalists increasingly rely on the Internet's speed and scope while investigating and researching stories. Accordingly, they have a substantial interest in the Internet's content remaining uncensored and unregulated.

B. Reporting stories of great social import sometimes requires the use of speech that could be considered "indecent" under the CDA.

In the instant case, the lower court cited numerous illustrations of non-obscene material likely to be available on the Internet but subject to the CDA's criminal provisions. For

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[1] For example, a *Kansas City Star* reporter investigating the Food and Drug Administration's handling of a warehouse fire that released toxic substances resulting in the contamination of food stored in the warehouse used the Internet's Fedworld gateway to pull up the FDA's electronic bulletin board. The reporter noticed that the agency awarded additional contracts to the same companies that had botched disposal of the contaminated food. Steve Weinberg, *The Reporter's Handbook* (1996).

example, a human rights group might post information about female circumcision rituals performed in other countries, and advocacy groups might provide information about transmitting the HIV-virus and safe sex techniques. *ACLU v. Reno*, 929 F. Supp. 824, 853 (E.D. Pa. 1996).

The lower court further observed that artistic works may potentially violate the CDA. For example, the work of controversial photographer Robert Mapplethorpe "would be patently offensive in some communities," *Reno*, 929 F. Supp. at 853 (photographs showing sexual organs), as demonstrated by the April 1990 indictment on obscenity charges of the Contemporary Arts Center in Cincinnati and its director for exhibiting Mapplethorpe's work. It is not alarmist to assert that a news organization covering the story could be subject to prosecution under the CDA.[2]

Despite the fact that these sources may contain information that is "indecent" or "patently offensive" to minors, they clearly are of significant public concern. In order for journalists to keep the public informed about important political, social and cultural matters, they need to be able to gain access to these websites and download the posted information. Journalists should not be impeded in their efforts to seek out information that assists them in discussing these matters intelligently.

Following are examples of websites where information

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[2] In August 1990, the American Family Association filed a complaint with the FCC when WGBH-TV in Boston broadcast photographs from the Cincinnati exhibit on its "Ten O'Clock News" program to illustrate the debate about the artistic merit of Mapplethorpe's work. The FCC ultimately concluded that it lacked jurisdiction because WGBH aired the photographs after 10 p.m. 1991 Warren Publishing Inc., *Communications Daily*, April 29, 1991 at 5.

useful to journalists is posted that contains language that could arguably violate the statute.

(1) http://www.militarywoman.org — women in the armed services providing explicit descriptions of their experiences of being sexually harassed while on duty.
(2) http://www.uspto.gov — interestingly enough, a Government-maintained website. This is the Patent Office's website which includes posting of medical devices involving reproductive and excretory activities.
(3) http://www.amnestyint.com — a report on the genital torture and killing of a man by the Serbian police.

Enforcement of the CDA would burden the ability of journalists to cover these important issues.

C. The press routinely covers subjects that arguably fall within the purview of the CDA.

As discussed *supra* at 3, every type of media organization in this country, from broadcast networks to student newspapers, maintains websites where online versions of its material is posted. It is assumed that minors explore these websites.

A review of these websites reveals the existence of numerous articles covering a wide range of newsworthy and socially useful topics containing language that arguably violates the statute.

For example, appearing on *The New York Times* web page on February 7, 1997, was an article by a man who was a recently released hostage from the residence of the Japanese ambassador in Lima, Peru. In describing his experience, the man states that the hostages were reduced to urinating in soda bottles and defecating into plastic bags. *See* http://www.nytimes.com/web/docsroot/library/world/1229peru-

diaryreview.html.

The recently released audiotapes of a 1973 conversation between President Nixon and his chief of staff, H.R. Haldeman, provide another example of a newsworthy story containing explicit language. Media organizations posted stories on their websites reflecting the profane language Nixon used while discussing contributors to the Democratic Party and developments in the Watergate investigation. *See* the January 2, 1997 website of the Public Broadcasting Service's *News Hour*, http://www.pbs.org/newshour/bb/white_house/january97/nixon_1-2a.html; *see also* the websites for the *Fort Worth Star Telegram*, http://www.fwst.com:80/news/doc/1047/1:NATION J112596.html; the *Salt Lake Tribune*, http://www.sltrib.com:80/96/NOV/28/twr/01590120.htm; and *The Washington Post*, http:// www.washingtonpost.com:80/wp-srv/national/longterm/nixon/trans.htm.

In another example, *The San Francisco Examiner* posted on its website transcripts of a telephone conversation between then-Representative Mel Reynolds and a former underage campaign worker with whom Reynolds was having a sexual relationship. As a result of the relationship, Reynolds was convicted of obstruction of justice and having sex with a minor, and sentenced to five years in prison. During the conversation, Reynolds used graphic language for sexual intercourse, penis, and discussed masturbation, all of which is arguably "indecent." http://www.sfgate.com./examiner/bondage/BOND-23936.html.

The public has a legitimate interest in knowing about the conduct of its elected officials. Perhaps more importantly, the availability of the transcript provides the public with the opportunity to independently evaluate the Government's prosecution of Reynolds, the evidence presented against Reynolds, and the finding of Reynolds' guilt. Exposure to the system serves to educate the public and reinforce its faith in public institutions.

Following are other examples of newspaper websites that contain language that arguably violates the statute.

(1) http://www.newyorktimes.com/bosnia/indext.html Bosnia — a graphic photographic essay about the victims of ethnic violence in the Balkans.
(2) http://www.news:Rspain-monroeUR6ID_7F1@clari.net — a story about a short film purporting to show a young Marilyn Monroe engaging in explicit sex acts, and another story about sexually explicit films in Germany.
(3) http://www.stumedia.tsp.utexas.edu/webtexan. — *The Daily Texan*, the newspaper of the University of Texas at Austin, displays an editorial cartoon of a man, representing the student government, urinating on a copy of the newspaper in its February 7, 1997, edition.

This Court has long recognized that the press plays a vital role in promoting informed debate on matters of public concern. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[a] free press stands as one of the great interpreters between the Government and the people"). Although information posted on the Internet is available to anyone who seeks to gain access to it, the public relies on the press to keep it informed about important issues and events. In so doing, the press provides to the public a window through which it can scrutinize political and social events.

Nowhere is this role more critical than in facilitating the public oversight of Government activities. For example, "[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("attendance at court is no longer a widespread pastime," which "validates the media claim of functioning as surrogates for the public").

However, coverage of courts and trials involves the use of speech that arguably falls under the CDA's purview. Posted on *The Washington Post*'s website on February 7, 1997, was an article by reporter Anna Borgman about the trial of Timothy Bryan Chase, who was accused of raping a 15-year-old girl as her 7-year-old sister watched. http://www.washingtonpost.com. Although the article contains explicit language, it also informs the public about the functioning of the court and the administration of justice.

Additionally, numerous court opinions contain language that would arguably violate the CDA. For example, the Third Circuit was obliged to recount the graphic content of material in deciding whether a defendant, having been convicted for posses-sion of child pornography, was eligible under the Sentencing Guidelines for a reduction in his sentence for playing a minimal role in the offense. *U.S. v. Romualdi*, 101 F.3d 971 (3d Cir. 1996). Similarly, a defendant convicted of a capital offense appealed the presentation of his sexual predilections at the punishment stage of his trial, asserting that such evidence was overly prejudicial and irrelevant to the issue of his future dangerousness. *Boyle v. Johnson*, 93 F.3d 180 (5th Cir. 1996), *cert. denied*, 1997 U.S. Lexis 865 (U.S. February 18, 1997). In denying the *habeas corpus* petition, the court expressly referred to the graphic nature of the defendant's letters and drawings to hold that his obsession with sex led to a sexually motivated murder and reflected on his potential for future violence. Likewise, the Fourth Circuit explicitly referred to the verbal sexual harassment that the plaintiff alleged in determining that a same-sex harassment claim is not actionable under Title VII. *Mayo v. Kiwest Corp.*, 95-2638, 1996 U.S. App. Lexis 20445 (4th Cir. 1996) (*per curiam*).

A journalist writing about these cases would need to make express references to the language at issue. A news organization which posted such a story on the Internet could be subject to sanction under the CDA, despite this Court's

recognition that providing the rationale underlying Government decisionmaking promotes public understanding of our civil and political institutions, and is an essential function of a free press. *Nebraska Press Assn v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., concurring)

II. The Court should consider the inherent qualities of the medium rather than its novelty in determining the constitutionality of the CDA.

In light of the critical role of the press in informing the public about significant political, social and cultural matters, and the importance of Internet use by journalists, *amici* ask this Court to consider the unique and detrimental impact the CDA would have on the gathering and dissemination of news on the Internet.

As discussed *supra* at 3, every type of news media organization maintains websites where online versions of its material are posted. The very same story that is newsworthy, yet arguably indecent under the CDA, would be subject to the most exacting First Amendment protection in the print version, but would be criminalized in the online version. This inconsistency cannot be reconciled with this Court's First Amendment jurisprudence. *See New York Times v. United States*, 403 U.S. 713 (1971) (the Government is proscribed from enjoining publication of current news except in the most extreme circumstances); *Whitney v. California*, 274 U.S. 357, 377 (1927) ("[o]nly an emergency can justify repression" of First Amendment rights). *See also Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

A. The online news medium should receive the same exacting level of First Amendment protection as the print medium.

In reviewing content regulations on communications media, this Court, in the past, has considered the technical characteristics of the medium. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (noting that each medium of expression presents special First Amendment problems). Under this analysis, the Court granted the print media virtually unlimited First Amendment protection,[3] while the broadcast media, cable service providers and common carriers have received a lesser quantum of First Amendment protection. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

In enacting the CDA, instead of examining the inherent qualities of the medium, Congress focused on the novelty of the "brave new world" of Internet technology. 141 Cong. Rec. S8333 (daily ed. June 14, 1995) (remarks of Sen. Coats). As a consequence, the CDA is the most restrictive regulation applied to indecent speech found in any medium. The Government attempts to justify the CDA's unprecedented restrictions on Internet indecency using legal paradigms developed for other media. Brief of Appellants at 19. These rules cannot be applied to the Internet because the technical characteristics of the media are not analogous.

The lower court in the instant case agreed, concluding

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[3] *See Miami Herald v. Tornillo*, 418 U.S. 241 (1974); *Butler v. Michigan*, 352 U.S. 380 (1957). Exceptions to this rule have been carved out for obscenity, 18 U.S.C. §§ 1461-1465 (1994), and child pornography, 18 U.S.C. §§ 2251-2258 (1994), but not indecency.

that because content restrictions based on the technical characteristics unique to other media cannot be applied to the Internet, "Congress may not regulate indecency on the Internet at all." *ACLU v. Reno*, 929 F. Supp. 824, 877 (E.D. Pa. 1996).

If this Court should deem it necessary to draw an analogy to another medium in order to determine the constitutionality of the CDA, *amici* urge application of the least restrictive print model of content regulation to indecent speech on the Internet because the technical characteristics of the Internet more closely resemble print than any other medium. Like print, the Internet is primarily an active visual medium. Affirmative steps must be taken before messages can be read or understood. There is virtually no likelihood that anyone will stumble upon indecent expression unintentionally.

B. The *Pacifica* broadcast model does not fit the unique technology of the Internet.

This Court has held that the Government may regulate indecent expression when the audience is captive to a particular medium's message. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (holding that special treatment of indecent broadcasting is justified because of the pervasiveness of the medium); *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J. concurring) ("[w]hen expression occurs in a setting where the capacity to make a choice is absent, Government regulation of that expression may co-exist with and even implement First Amendment guarantees").

But, this Court has also held that where the capacity to make a choice is present — where the audience is not captive and affirmative steps must be taken to see or hear a message in a particular medium — expression in that medium cannot be regulated in the same way. *Sable Communications v. FCC*, 492 U.S. 115 (1989). In *Sable*, a case involving telephone

communications, the Court distinguished *Pacifica*, reasoning that "[t]here is no captive audience problem here; callers will generally not be unwilling listeners. . . . Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." *Id.* at 127-128. Similarly, there is no captive audience problem with the Internet. The message contained on the computer screen can be avoided.

The Government heavily relies on this Court's holding in *Pacifica* to justify the content restrictions in this case. Brief of Appellants at 20-21. In *Pacifica*, this Court upheld the FCC's power to compel broadcasters to "channel" programming that the FCC found to be indecent to hours when unsupervised children were unlikely to be in the audience. *Pacifica*, 438 U.S. 726. The decision was based largely on the notion that broadcast media have "established a uniquely pervasive presence in the lives of all Americans." *Id.* at 726. This Court emphasized that its holding was narrow and has consistently refused to extend it to any other media. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (declining to apply the *Pacifica* rule to commercial telephone communication); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (declining to apply the *Pacifica* rule to cable television).[4]

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[4] In *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996), the Court upheld a provision of the Cable Television Consumer and Competition Act of 1992 allowing cable system operators, not the government, to prohibit indecent programming over leased access channels. *Id.* But the Court struck down another provision that required indecent programming to be scrambled and subscribers to request access to that programming in writing. *Id.* The Court found that the scrambling and notice provisions were not the least restrictive means available to limit children's exposure to indecency. *Id.*

Nevertheless, the Government attempts to analogize *Pacifica* to the instant case. But these cases must be distinguished. The CDA ban on indecent speech is by far more restrictive than the broadcast restrictions upheld in *Pacifica*. There is no way to "time channel" content on the Internet. The CDA ban on Internet indecency necessarily extends to all hours of the day. Yet the Government attempts to force the Internet into the broadcast regulation model. The Internet simply does not fit.

The court below found the Government's argument wholly unpersuasive, holding that it "ignores *Pacifica's* roots as a decision in addressing the proper fit between broadcasting and the First Amendment . . . [and] assumes that what is good for broadcasting is good for the Internet." *Reno*, 929 F. Supp. at 874. *Amici* agree and urge this Court to recognize that *Pacifica* is not applicable to the medium of the Internet.

C. The CDA acts as an outright ban on newsworthy yet "indecent" speech and is therefore unconstitutional.

As noted *supra* at 3-7, reporting stories of great social import sometimes requires the use of speech that could be considered "indecent" under the CDA. This puts journalists in an untenable position. They must choose between posting a newsworthy story that might violate the CDA, subjecting themselves to criminal prosecution, or excluding from their website material that is protected by the First Amendment. In this context, the CDA may operate as a prior restraint or outright ban on indecent Internet speech effectively depriving adults access to that speech.

This Court has consistently held that outright bans on indecent speech are unconstitutional. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (striking down a statute banning indecent telephone messages); *Butler v.*

Michigan, 352 US 380, 381 (1957) (striking down a statute prohibiting the sale of "immoral, lewd, or lascivious" *i.e.*, indecent material as insufficiently tailored since it denied adults their First Amendment rights by limiting them to only what was acceptable for children).

Simply put, a regulation cannot, consistent with the Constitution, cut off an adult's access to indecent material in an effort to protect children from the alleged harmful effects of that material. *Sable*, 492 U.S. at 128. Yet this is precisely what the CDA does.

In its brief to the Court, the Government argues that the restrictions imposed by the CDA do not constitute an outright ban on indecent speech. Brief of Appellants at 33. These arguments are not persuasive.

The Government contends that the CDA does not operate as an outright ban on indecency because adults have reasonable alternatives to obtaining indecent material online. The Government asserts that "in addition to attending live theater and nightclubs, adults interested in indecent material can purchase tapes, compact discs, books, magazines, videotapes and CD Roms." Brief of Appellants at 28.

From the journalist's perspective, these are not reasonable alternatives. Obviously the current news of the day is not ordinarily available in theaters or nightclubs. Moreover, although newsworthy information may be available through alternative media, these media cannot be continuously updated and are not instantaneously accessible like the Internet. As discussed *supra* at 3, these characteristics have transformed the way news is disseminated allowing a global audience numbering in the millions to receive current news on demand. The CDA would force journalists to limit the news they place on the Internet to that which is fit for children, curtailing the public's access to a great deal of newsworthy information.

In addition, the Government's suggested alternatives cannot replace the Internet as a research tool for journalists. *See supra* at 2-3. The Government argues that the Internet's "unmatched potential" as a learning tool will be lost "if substantial numbers of people are unwilling to avail themselves of its benefits because they do not want their children exposed to patently offensive material." Brief of Appellants at 30. *Amici* believe this statement is illogical. In fact, the potential of the Internet will be lost if information providers are unwilling to post material that even arguably could be considered indecent because they do not want to risk criminal liability for violating the CDA. The adverse impact on newsgathering is obvious; information sources would dry up.

As noted *supra* at 4, many websites operated by educational institutions, research centers, nonprofit organizations, and even Government agencies contain information of great social, political, and scientific significance that is arguably indecent under the CDA. This information is extremely useful to journalists in developing news reports about newsworthy matters. However, should these website operators choose to remove the arguably indecent speech from their websites rather than risk violating the law, journalists will find it far more difficult to gain access to this information and consequently, will be less able to keep the public informed about such newsworthy matters.

The Government also argues that the CDA does not act as a complete ban on indecent speech because the statutory defenses act as a safe harbor allowing speakers to post indecent speech on the Internet as long as they restrict access to indecent materials "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number," 47 U.S.C. § 223(e)(5)(B) or otherwise take "in good faith, reasonable, effective and appropriate actions . . . to restrict or prevent access to minors." 47 U.S.C. § 223(e)(5)(A). *See* Brief of Appellants at 27. However, these

defenses are impractical and, if employed, would restrain rather than encourage free expression.

The defenses would not provide a safe harbor for journalists disseminating news. News organizations publish huge amounts of information in which minors as well as adults have a legitimate need and interest. In order to avoid prosecution under the CDA, news organizations would have no choice but to evaluate every single news item made available online, which can number in the hundreds each day, in an attempt to identify those that might arguably fall within the definition of "indecent" or "patently offensive" and restrict minors' access to those items. Given the complication, uncertainty, time and expense involved in such an endeavor, most online news providers would have no choice but to attempt to deny minors access to all material they electronically publish. Thus the potential of the Internet as an educational tool for students would be seriously compromised, if not destroyed.

The court below determined that "most content providers cannot determine the identity and age of every user accessing their material." *Reno*, 929 F. Supp. at 854. Journalists are no different. Some of the most respected news organizations in the nation now make their entire story archives available online to anyone, including *The Christian Science Monitor*, http://www.csmonitor.com; *Sacramento Bee*, http://www.sacbee.com; *St. Louis Post-Dispatch*, http://www.stlnet.com; *Kansas City Star*, http://www.kcstar.com and *Detroit News*, http://www.detnews.com. These publications might well decide to simply eliminate stories containing arguably indecent speech from their online publications, even if the stories are of great social import, rather than risk criminal liability for violating the CDA. In this context, the CDA operates as an outright ban on indecent speech.

In addition, any form of verification that requires users

to identify and register themselves by name may act as a prior restraint. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374, 2391 (1996) (holding a written notice requirement akin to registration "will further restrict viewing by subscribers who fear for their reputations should the operator . . . disclose the list of those who wish to watch the 'patently offensive channel'").

Moreover, registration might destroy journalists' ability to conduct research anonymously, undermining their efforts to discover factual information in some investigative situations. *See Philip Morris Co. v. ABC, Inc.*, 36 Va. Cir. 1; 1995 Va. Cir. Lexis 1250 at *35 (Cir. Ct. Richmond) (Aug. 4, 1995) (extending qualified reporter's privilege to journalists' transactional telephone, hotel and credit card records, noting that although it may be possible to gather news without utilizing them, "these alternative means of research . . . in today's society are unreasonable and would unduly burden and infringe upon First Amendment freedoms"); *Food Lion Inc. v. Capital Cities/ABC Inc.*, No. 6:92CV00592, Scheduling and Discovery Order, (D. N.C. Sept. 6, 1996) (barring discovery of journalists' hotel, mail service and telephone records) (citing *Philip Morris Co. v. ABC, Inc.*).

For these reasons, the CDA would operate as a complete and total ban of indecent speech on the Internet in violation of the First Amendment and the principles this Court upheld in *Sable*, 492 U.S. at 131.

III. Enforcement of the CDA would result in significant restrictions on journalists' ability to do their jobs.

A. The CDA's criminal sanctions will act as a prior restraint by discouraging publication of newsworthy material.

The CDA would subject Internet information providers

to criminal penalties for posting indecent speech. The threat of criminal prosecution would inevitably operate as a prior restraint on the news media, chilling free expression and discouraging publication of newsworthy stories. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (fear of post-publication punishment may act as a prior restraint causing news coverage to be "blunted or reduced"). *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11 (1981) (equating the chilling effect of prior restraints and post-publications sanctions). As the court below noted,

> [c]riminal prosecution, which carries with it the risk of public obloquy as a well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider . . . is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgement as to what is indecent.

Reno, 929 F. Supp. at 856.

This Court has held that a prior restraint might be valid under three exceptional circumstances: the published material was obscene, would breach national security, or would incite acts of violence or violent overthrow of the Government. *Near v. Minnesota*, 283 U.S. 697 (1931). The Government interest in the instant case simply does not justify an absolute proscription of indecent speech on the Internet. *Amici* urge this Court to strike down the CDA as an unconstitutional prior restraint.

B. Recently enacted law has weakened protection against newsroom searches, and the CDA could further undermine these protections.

Amici are alarmed at what appears to be increasing

Governmental ambivalence toward journalists' privacy rights. In criminalizing indecency, the CDA could give the Government one more opportunity to search newsrooms and seize reporters' research materials and work product under the guise of protecting children from the harmful effects of indecent speech.

To illustrate this point, recently enacted legislation, prompted by concerns over the use of computer technology to produce and transmit child pornography, has significantly weakened protection against Government intrusion into newsrooms. The Child Pornography Prevention Act of 1995 (hereinafter CPPA), signed into law in September 1996 as part of the Federal Omnibus Appropriations Bill, Section 121, creates a new exemption to the Privacy Protection Act, 42 U.S.C. § 2000aa, permitting newsroom searches for and seizures of materials relating to child pornography and child exploitation offenses.

Since the Privacy Protection Act became law in 1981, it has been unlawful for law enforcement officials to search for or seize newsroom materials in most situations. In cases where possession or communication of such materials is a crime, search and seizure of work product or documentary materials, which include reporters' notes and/or research materials, were permitted only if the offense involved national security or classified information. *Id.* Under the Privacy Protection Act, journalists had an extra layer of protection, beyond the Fourth Amendment, because the Act provided civil penalties for its violation. But as amended by the CPPA, law enforcement officials may now search newsrooms to look for and seize child pornography and exploitation materials without incurring civil penalties. *See* Jim Fisher, *Researchers Fear Hatch's Porn Bill*, Salt Lake Trib., Aug. 21, 1996 at A-1.

The CDA would effectively place indecency in the same criminal category as child pornography and espionage. This could eventually subject indecent material to the provisions of

the CPPA (or similar legislation), resulting in additional searches of newsrooms and seizures of journalists' work product and documentary materials. *See Steve Jackson Games, Inc. v. U.S. Secret Service*, 816 F. Supp. 432 (W.D. Tex. 1993) (recognizing that the Privacy Protection Act applies to new media including computer bulletin boards). "In the modern electronic newsroom, a police search may well become an official intrusion into the technological mind and memory of the reporters and editor." Rodney A. Smolla, *Free Speech in an Open Society* 276 (1992). *Amici* urge this Court to consider the detrimental impact the CDA may have on journalists' privacy rights in light of the recently weakened prohibition against newsroom searches.

C. The statute is not saved by Government assertions of benign enforcement.

Journalists can take little comfort in Government assurances that it would apply the CDA in a way that would avoid prosecution for placing meritorious works on the Internet. In other contexts, the Government has declined to categorically insulate news broadcasts from indecency restrictions.[5] For

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[5] There have been indecency challenges to news programs, although the FCC did not impose sanctions in those cases. For example, a listener filed a letter of complaint with the FCC against National Public Radio for an evening broadcast about organized crime in which John Gotti used expletives. The FCC determined that the material in question was "not actionably indecent" pursuant to the governing statute. *Letter Ruling*, 6 F.C.C.R. 610 (1991). The D.C. Circuit did not reach the merits on appeal, instead dismissing the case for lack of standing. *Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 1610 (1994). In another case, the FCC determined that a local television documentary that included "candid discussions of sexual topics" and the use of "sex organ

example, the FCC has refused to furnish news broadcasts with a blanket exemption from its indecency regulations. *In the Matter of Enforcement of Prohibitions Against Broadcast Indecency*, 8 F.C.C.R. 704, 709 (1993); *In re Infinity Broadcasting Corp.*, 3 F.C.C.R. 930, 932, 937 n.28 (1987).

The FCC has also refused to provide broadcasters with comprehensive guidance as to whether particular news or public-affairs programs might be considered indecent. *In re Petition for Clarification*, 59 F.C.C.2d 892, 893 (1976) (invoking its "long standing policy of refusing to issue interpretive rulings or advisory opinions" when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them). The uncertainty that results from unclear standards can only lead to the chilling of material, regardless of its merit. *Action for Children's Television v. FCC*, 58 F.3d 654, 685 (D.C. Cir. 1995) (Wald, J. dissenting) (enforcement of unclear indecency regulations for broadcasters leads to "both government and self-censorship"), *cert. denied*, 116 S.Ct. 701 (1996).

Moreover, as recognized by the lower court, the statute is not "readily susceptible" to the Government's narrow construction. *Reno*, 929 F. Supp. at 854 (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). There is no evidence in the legislative history that Congress intended to narrow the scope of the CDA or to create special exceptions for news. The statute's reach is not limited to commercial pornographers, and Congress did not include language that would define "patently offensive" or "indecent" to exclude material of serious value. *Reno*, 929 F. Supp. at 855.

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models to simulate the use of various birth control devices" was not indecent. KING-TV, *Memorandum Opinion*, 5 F.C.C.R. 2971 & n.2 (1990).

Fortunately, as the lower court opined, the First Amendment does not "require us to entrust the protection it affords to the judgment of prosecutors." *Id.* Accordingly, notwithstanding the Government's interpretation, the CDA cannot survive constitutional scrutiny.

CONCLUSION

The vitality of our civil and political institutions depends on an educated citizenry that engages in open and free discussion about a broad range of matters of public concern. The right to speak freely and to promote diversity of ideas and programs is one of the chief distinctions that sets us apart from totalitarian regimes. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (the free exchange of ideas ensures the meaningful exercise of political freedom).

The press plays a decisive role in shaping and facilitating public debate. *Board of Education v. Pico*, 457 U.S. 853, 859 (1982).

> As money is to the economy, so the press is to our political culture; it is the medium of circulation. It is the currency through which the knowledge of recent events is exchanged; the coin by which *public* discussion may be purchased.

Address by Justice William Brennan, 32 Rutg. L. Rev. 173, 175 (1979).

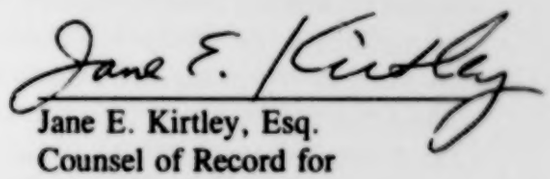
Therefore, news and commentary on public issues lie "at the heart of First Amendment protection." *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984).

Because of the detrimental impact that the CDA would have on newsgathering and dissemination, *amici* urge this Court to uphold the lower court's decision. Material which has serious

literary, artistic, political or scientific merit is entitled to the broadest protection under the First Amendment, regardless of whether it is also arguably indecent or patently offensive to minors and regardless of the medium in which it is transmitted.

For the foregoing reasons, *amici* respectfully request that this Court affirm the lower court's decision.

Respectfully submitted,



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